

EXHIBIT I

ATTISANO & ROMANO

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VIA EMAIL & HAND DELIVERY

November 30, 2020

Honorable Douglas Chew, Chair Commissioner Westmoreland County
Honorable Sean Kertes, Vice Chair Commissioner Westmoreland County
Honorable Gina Cerilli, Secretary Commissioner Westmoreland County
Melissa Giddy, Esquire – Solicitor Westmoreland County

Re: November 30, 2020 Board of Elections Meeting

Dear Commissioners,

As you know, we represent Senator James Brewster and the Pennsylvania Democratic Party (“PDP”) in the various matters involving the Boards of Election in both Westmoreland County and Allegheny County, and the litigation associated with decisions of those boards. We are writing to you today in anticipation of this afternoon’s meeting of the Westmoreland County Board of Elections (“Board”). Specifically, we are asking that the Board agree to count a set of mail in ballots in which the registered voters filled out the Declaration on the outside envelope containing their ballots, but omitted to fill in the date such Declaration was prepared. We wanted to provide the Board with an update of litigation relating to that particular issue in support of our position that these particular voters should not be disenfranchised and that the Board should vote to accept and count such ballots.

This exact category of ballots has been the subject of litigation that commenced in the Allegheny County Board of Elections (“Allegheny Board”), which decided, on November 14, 2020, to count the votes of 2,349 individual voters who had completed the Declaration on the outside envelope containing their ballots, but had not written in the date of such Declaration. The Allegheny Board was able to confirm that these ballots were timely received through the use of a time-stamp and in tracking the receipt of such ballots in the SURE System. Candidate Ziccarelli appealed that decision to the Court of Common Pleas of Allegheny County (“CCP Allegheny”), which affirmed the decision of the Allegheny Board.¹ Candidate Ziccarelli appealed that decision to the Commonwealth Court, which, by a 2-1 vote, reversed the decision of the CCP Allegheny. Upon an appeal of Senator Brewster and the PDP, the Pennsylvania Supreme Court, on November 23, 2020, in *In Re: 2,349 Ballots In The 2020 General Election* (No. 29 WAP 2020) reversed the Commonwealth Court and issued the following order:

The decision of the Commonwealth Court is hereby reversed and the decision of the Allegheny County Court of Common Pleas is reinstated. Justices Baer and Todd join the opinion. Justice Wecht concurs in the result and files a concurring

¹ *Ziccarelli v Allegheny BOE and PDP & James Brewster* (GD 20-011654) Opinion & Order attached as Appendix A.

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and dissenting opinion. Justice Dougherty files a concurring and dissenting opinion in which Chief Justice Saylor and Justice Mundy join.²

Candidate Ziccarelli immediately filed with the Pennsylvania Supreme Court an Application for Reargument/Reconsideration, which the Court denied on November 25, 2020.³

Not content to accept the ruling of the highest court in the Commonwealth, and allow the votes of 2,349 registered voters to count, Candidate Ziccarelli filed a Complaint in the United States District Court on November 25th and also requested a Temporary Restraining Order (“TRO”). See *Nicole Ziccarelli v Allegheny County BOE, et. al.* (No. 20-1831). Late that afternoon, the Honorable Nicholas Ranjan conducted a hearing on the TRO. Candidate Ziccarelli asserted that, although the Allegheny Board was going to count the 2,349 ballots that were the subject of Pennsylvania Supreme Court decision, the fact that the Westmoreland Board had not counted the same category of ballots raised federal constitutional questions. Candidate Ziccarelli specifically asked the court to block the Allegheny Board from counting these votes, despite the order of the Pennsylvania Supreme Court. However, Judge Ranjan denied the request of Candidate Ziccarelli to “level down” by not counting the 2,349 ballots in Allegheny County, and suggested that the appropriate response would be to “level up” and count the votes in Westmoreland County, citing the recent decision of Judge Matthew Brann in *Donald J. Trump for President v. Boockvar*, Case No 4:20-cv-2078, --- F.Supp.3d ---, 2020 WL 6821992 at *12 (M.D. Pa. Nov. 21, 2020) (“When remedying an equal-protection violation, a court may either “level up” or “level down.” This means that a court may either extend a benefit to one that has been wrongfully denied it, thus leveling up and bringing that person on par with others who already enjoy the right, or a court may level down by withdrawing the benefit from those who currently possess it. Generally, the preferred rule in a typical case is to extend favorable treatment and to level up.”), aff’d No. 20-3371, --- Fed. Appx. --- (3d Cir. Nov. 27, 2020) (Slip Op., Bibas, J.). See also Ranjan Tr. 29: 3-30:6 (analyzing *DJT v. Boockvar*). We have attached the transcript of the TRO hearing before Judge Ranjan as Appendix D.

As the Board is aware, it has not yet ruled on the treatment of this particular category of votes, where eligible voters omitted the date on the Declaration. On or about November 13, 2020, Commissioner Cerilli made a motion to count such ballots, but the motion did not receive a second and thus was tabled. In view of the ruling of the Pennsylvania Supreme Court⁴ and the subsequent decision of Judge Ranjan specifically denying Candidate Ziccarelli’s efforts to block the counting of these 2,349 ballots, it seems appropriate that the Westmoreland Board follow the Pennsylvania Supreme Court and Judge Ranjan’s guidance and “level up” by counting those ballots in

² The Order for *In Re: 2,349 Ballots In The General Election* (29 WAP 2020) is attached as Appendix B.

³ The Order denying candidate Ziccarelli’s Application for Reargument/Reconsideration is attached as Appendix C.

⁴ The PA Supreme Court also consolidated the Allegheny County “no date” case with the Philadelphia County “no date” case and referenced Montgomery County and others in footnotes of the Opinion, which made it obvious that the principle to count otherwise valid and timely “no date” mail in ballots applies to all counting still occurring throughout the state.

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Westmoreland County, like the 2,349 ballots cast in Allegheny County, in which a voter simply omitted the date on the Declaration.

Senator Brewster and the Pennsylvania Democratic Party urge this Board to count such ballots and request that Candidate Ziccarelli join us in this request to “level up” and treat these ballots as they are being treated in Allegheny County and throughout the Commonwealth. We suspect that federal courts would look unfavorably upon a candidate who, through the calculated disenfranchisement of a select group of voters, sought to create a contrived federal constitutional claim. Judge Ranjan has indicated that differing decisions of the Allegheny Board and this Board would not create such an issue. Certainly, with the benefit of the decisions of the Pennsylvania Supreme Court and the United States District Court, the decision to count such ballots is compelling, and, most importantly, fair.

Thank you for your consideration.

Sincerely,

/s/ James Antoniono

James Antoniono

Sincerely,

/s/ Marco S. Attisano

Marco S. Attisano

Enclosed:

Ziccarelli v Allegheny BOE and PDP & James Brewster (GD 20-011654) Opinion & Order attached as Appendix A.

PA Supreme Court Order for *In Re: 2,349 Ballots In The General Election* (29 WAP 2020) is attached as Appendix B.

PA Supreme Court Order denying candidate Ziccarelli’s Application for Reargument/Reconsideration is attached as Appendix C.

Transcript for hearing on request for a Temporary Restraining Order (“TRO”) before Judge Ranjan is attached as Appendix D. *See Nicole Ziccarelli v Allegheny County BOE, et. al.* (No. 20-1831).

CC: James Gorman, Esquire

APPENDIX A

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION**

NICOLE ZICCARELLI,

No. GD 20-011654

Petitioner,

v.

MEMORANDUM AND ORDER OF COURT

ALLEGHENY COUNTY BOARD OF
ELECTIONS,

Respondent,

Honorable Joseph M. James

and

Copies Sent To:

PENNSYLVANIA DEMOCRATIC PARTY
AND JAMES BREWSTER,

Matthew H. Haverstick, Esquire
Andrew F. Szefi, Esquire
Allan J. Opsitnick, Esquire
Michael J. Healey, Esquire

Intervenors.

2020 NOV 18 PM 12:25

DEPT. 6 CLERK
CIVIL DIVISION
ALLEGHENY COUNTY PA

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION**

NICOLE ZICCARELLI,

Petitioner,

v.

ALLEGHENY COUNTY BOARD OF
ELECTIONS,

Respondent,

and

PENNSYLVANIA DEMOCRATIC
PARTY AND JAMES BREWSTER,

Intervenors.

No. GD 20-011654

MEMORANDUM AND ORDER OF COURT

James, J.

November 18, 2020

Petitioner Nicole Zicarelli, candidate for the Senate of Pennsylvania from the 45th Senatorial District, filed a Petition for Review of Decision by the Respondent Allegheny County Board of Elections ("the Board") on November 12, 2020, seeking to invalidate

2,349 mail-in ballots cast by voters in the November 3, 2020 General Election. Petitioner seeks review of the Board's decision to overrule Petitioner's objection to count these ballots. Petitioner alleges that these ballots were cast in violation of the Election Code because they do not contain a date penned by the elector on the outer envelope. The Court conducted a hearing on November 17, 2020 via Microsoft Teams. The Pennsylvania Democratic Party and James Brewster moved to intervene in the action. Petitioner and the Board did not object and the motion was granted by the Court. Petitioner stated that she was not claiming any voter fraud regarding the challenged ballots. The Board argues that the failure to place a date on the outer envelope does not invalidate a ballot.

Section 3150.16(a) of the Election Code states:

- (a) General rule--At any time after receiving an official mail-in ballot, but on or before eight o'clock p.m. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "official election ballot." This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

The Election Code Section 3146.8(g)(3) vests the Board with the duty of determining the sufficiency of the declaration of a mail-in ballot. If the Board determines that the declaration is sufficient, then the Board "shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed." Id. Any ballots cast by electors whose applications have been challenged are set aside

unopened, but all other ballots that have been verified under subsection (g)(3) shall be counted. 25 P.S. Section 3146.8(g)(4).

The Court agrees with the Board that the Section 3150.16(a) date provision is directory not mandatory. Specifically, the use of the word "shall" does not make a statutory phrase mandatory. It is well settled Pennsylvania law that election laws should be construed liberally in favor of voters, and that "[t]echnicalities should not be used to make the right of the voter insecure." Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 373 (Pa. 2020) citing Appeal of James, 105 A.2d 64, 65-66 (Pa. 1954). "Ballots containing mere minor irregularities should only be stricken for compelling reasons." Shambach v. Bickhart, 845 A.2d 793, 798 (Pa. 2004).

The ballots at issue here are sufficient even without a voter supplied date. They were processed in the Statewide Uniform Registry of Electors ("SURE") system and timestamped when they were timely delivered to the Board on or before November 3, 2020. They were signed and have been otherwise properly completed by a qualified elector. In light of the fact that there is no fraud, a technical omission on an envelope should not render a ballot invalid. The lack of a written date on an otherwise qualified ballot is a minor technical defect that does not render it deficient. The Court finds that the Board properly overruled Petitioner's objections to the 2,349 challenged mail-in ballots. These ballots must be counted. The Petition for Review is denied and the Board's decision is affirmed.

Joseph M. James

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

NICOLE ZICCARELLI,

Petitioner,

v.

ALLEGHENY COUNTY BOARD OF
ELECTIONS,

Respondent,

and

PENNSYLVANIA DEMOCRATIC
PARTY AND JAMES BREWSTER,

Intervenors.

No. GD 20-011654

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CIVIL DIVISION
ALLEGHENY COUNTY PA

ORDER OF COURT

And NOW, this 18th day of November 2020, upon consideration of the Petition For Review In the Nature Of A Statutory Appeal filed by Nicole Zicarelli, and any responses thereto, it is hereby ORDERED that the Petitioner's appeal is dismissed and the decision of the Board of Elections is affirmed.

BY THE COURT:

Joseph M. James

APPENDIX B

You are logged on as: mattisano

PACFile® - View Notification **Navigate To**[Initiate New Case](#)[Case Filing](#)[Case Search](#)[Dashboard](#)**Electronic service for case 29 WAP 2020**

Service Date: 11/23/2020

Served By: Supreme Court Western District





Docket Number: 29 WAP 2020 

Lead Case Caption: In Re: 2,349 Ballots in the 2020 General Election

Filing Type: Reversed/Reinstated

Filed Date: 11/23/2020

Filers: Donohue, Christine

Documents:  [CO-DO](#)
 [MO](#)
 [Judgment Copy - MO](#)
 [CO-DO](#)

Comments

Type	Comment
Comments	The decision of the Commonwealth Court is hereby reversed and the decision of the Allegheny County Court of Common Pleas is reinstated. Justices Baer and Todd join the opinion. Justice Wecht concurs in the result and files a concurring and dissenting opinion. Justice Dougherty files a concurring and dissenting opinion in which Chief Justice Saylor and Justice Mundy join.

APPENDIX C

**[J-118F-2020]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

IN RE: 2,349 BALLOTS IN THE 2020 GENERAL ELECTION	:	No. 29 WAP 2020
	:	
	:	
	:	
	:	
APPEAL OF: ALLEGHENY COUNTY BOARD OF ELECTIONS	:	
	:	

ORDER

PER CURIAM

AND NOW, this 25th day of November, 2020, the Emergency Application for Reargument by Nicole Ziccarelli, filed on November 24, 2020, is hereby **DENIED**

Chief Justice Saylor and Justice Mundy note their dissent.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
OF WESTERN PENNSYLVANIA

NICOLE ZICCARELLI,

CIVIL ACTION

Plaintiff,

No. 20-1831

vs.

ALLEGHENY COUNTY BOARD OF
ELECTIONS, et al.,

Defendants.

Transcript of TELEPHONIC MOTION HEARING held on
November 25, 2020
United States District Court, Pittsburgh, Pennsylvania
BEFORE: HONORABLE J. NICHOLAS RANJAN, DISTRICT JUDGE

APPEARANCES:

For Plaintiff:

Joshua J. Voss
Kleinbard LLC
115 State Street
2nd Floor
Harrisburg, PA 17101

Matt Haverstick, Esq.
Shohin Vance, Esq.
James Gorman, Esq.
Samantha Zimmer, Esq.

For Allegheny County Board
Of Elections, et al.:

Andrew F. Szefi
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445 Fort Pitt Boulevard
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Pittsburgh, PA 15219

Virginia Scott, Esq.
Frances Liebenguth, Esq.

For Kathy Boockvar:

Michele D. Hangley
Hangley Aronchick Segal
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One Logan Square
27th Floor
Philadelphia, PA 19103

Keli Neary, Esq.
Karen Romano, Esq.
Rob Wiygul, Esq.

For PA Democratic Party and
James Brewster:

Clifford Levine, Esq.
Dentons Cohen & Grigsby,
EQT Plaza, 625 Liberty Ave,
Pittsburgh, PA 15222

Lazar Palnick, Esq.
Marco Attisano, Esq.

Court Reporter:

Karen M. Earley, RDR-CRR
Joseph F. Weis, Jr.
U.S. Courthouse
6260 U.S. Courthouse
700 Grant Street
Pittsburgh, PA 15219
412-201-2660

Proceedings reported by mechanical stenography.
Transcript produced by computer-aided transcription.

1 P R O C E E D I N G S

2 (November 25, 2020, 4:00 p.m.)

3 (Whereupon, roll call was taken by the
4 Courtroom Deputy Clerk.)

5 THE COURT: Good afternoon, everybody. This
6 is Judge Ranjan.

7 We're here on a motion for a TRO. The case is
8 Ziccarelli versus Allegheny County Board of Elections,
9 et al., Case No. 20-1831.

10 My understanding is that before I joined this
11 call, that all counsel were able to enter their
12 appearances for the record.

13 I do have a court reporter on the line but
14 just to make sure that I have at least the lead speaking
15 attorneys here on the line, do I have Mr. Voss for the
16 plaintiff?

17 MR. VOSS: You do, Your Honor. Thank you.

18 THE COURT: All right. Good afternoon.

19 Then for Allegheny County Board of Elections,
20 do I have Mr. Szefi?

21 MR. SZEFI: Yes, Your Honor.

22 THE COURT: Good afternoon.

23 Then for Secretary of State Boockvar, do I
24 have Ms. Hangle?y?

25 MS. HANGLEY: Yes, Your Honor. And, Your

1 Honor, I will be filing for pro hac vice.

2 THE COURT: Okay. Very good. You are entered
3 regularly at this point.

4 Do I have anybody from Pennsylvania Democratic
5 Party and Mr. Brewster?

6 MR. LEVINE: Yes, Your Honor. This is Cliff
7 Levine. I will be the primary speaker.

8 THE COURT: Very good.

9 Ms. Hangley made a good point as to
10 pro hac vice motions. In addition to her, there are
11 several others. I think I saw for plaintiff's counsel
12 there are some pro hac vice motions that will be
13 forthcoming. I would just ask all counsel file their
14 pro hac vice motions promptly after this hearing just so
15 we can make sure that I grant those and everybody can be
16 properly admitted, but I will permit the parties to
17 proceed without formally granting the pro hac vice
18 admissions at this point.

19 One other sort of housekeeping issue. I don't
20 think Mr. Brewster and the Pennsylvania Democratic Party
21 are named defendants in this case.

22 Mr. Levine, do you intend to move for
23 intervention to intervene in this case?

24 MR. LEVINE: Yes, we do. We are preparing
25 those papers, Your Honor, but I can orally make that

1 motion as well to intervene on behalf of Senator
2 Brewster and the Party.

3 THE COURT: Any objection to that? My
4 understanding of Rule 24 is that based on some other
5 rulings I made, that both the Pennsylvania Democratic
6 Party and Mr. Brewster will be eligible to intervene at
7 least permissibly in this case.

8 Any objections to their intervention,
9 Mr. Voss?

10 MR. VOSS: At this time, we have no objection.
11 That makes sense.

12 THE COURT: Okay. Mr. Szefi?

13 MR. SZEFI: No, no objection, Your Honor.

14 THE COURT: Thank you.

15 Ms. Hangley?

16 MS. HANGLEY: No objection, Your Honor.

17 THE COURT: All right. Very good.

18 Mr. Levine, your oral motion is granted and so
19 no need to file any papers. At the conclusion of this
20 hearing, I will enter an order that grants intervenor
21 status to both the Pennsylvania Democratic Party as well
22 as Mr. Brewster.

23 MR. LEVINE: Thank you.

24 THE COURT: So with respect to the motion for
25 a TRO, before we get started, I will say for purposes of

1 the record and for all of you, I received the complaint.
2 I think the complaint was filed earlier today or earlier
3 this afternoon, along with -- it was a verified
4 complaint, along with a motion for TRO. The case was
5 randomly assigned to me.

6 Since then, I reviewed the complaint and the
7 TRO motion. I've also reviewed the Pennsylvania Supreme
8 Court decision from a couple days ago involving these
9 same 2,000 ballots and I'm also just generally familiar
10 with a lot of the underlying cases implicated by the
11 motion.

12 Prior to this call, I and my courtroom deputy
13 reached out to plaintiff's counsel to alert them to
14 schedule this call today at 4:00 p.m. and to alert all
15 defense counsel to be present. So that's what brings us
16 to this point in time.

17 I guess the only other data point that I would
18 ask counsel, but I think I'm generally aware of because
19 I was online and I saw this in the paper, it was that
20 the Commonwealth Court appears to have issued an
21 injunction that delayed or enjoined certification of the
22 votes for any down-ballot races which I presume would
23 include this particular race between Ms. Zicarelli and
24 Mr. Brewster.

25 In terms of how we want to proceed at this

1 point in time, I'm glad to first hear from Mr. Voss for
2 the plaintiff if you want to indicate how you want to
3 proceed.

4 I know that before this hearing, I was alerted
5 you may have a witness as well, and I'm fine hearing
6 evidence from everyone today. It didn't strike me from
7 reading the papers that this hearing required much
8 factual development. So I primarily wanted to hear oral
9 argument from the parties, but if anyone wanted to put
10 into evidence anything, I would be glad to hear it
11 either through witness testimony or it may be more
12 efficient to do so by proffer.

13 I just heard a beep. I would like to make
14 sure I still have everybody on the line.

15 Mr. Voss, do I still have you?

16 MR. VOSS: Yes, Your Honor.

17 THE COURT: Mr. Szefi?

18 MR. SZEFI: Yes.

19 THE COURT: Ms. Hangle?y?

20 MS. HANGLEY: I'm still here, Your Honor.

21 THE COURT: Mr. Levine?

22 MR. LEVINE: I'm here, Your Honor.

23 THE COURT: Okay. So with that, let's get
24 started. Mr. Voss, do you want to proceed?

25 MR. VOSS: Yes, Your Honor.

1 Thank you for making time for us this
2 afternoon on what we think is a pretty important issue.

3 We do have witnesses available but I suspect
4 much of what I'm about to present by way of factual
5 background is going to be undisputed, so in the interest
6 of time, let me say the best I can with the most
7 accurate information I am able to present to the Court
8 as evidence and we can verify it with witness testimony,
9 but I'll note that our complaint is verified.

10 Some of this information is state of the art
11 and has happened even since we filed the complaint at
12 one o'clock.

13 Let me start with this. This case concerns
14 the election for the 45th Senatorial District in the
15 Pennsylvania Senate. It's a district that covers
16 Allegheny in part and Westmoreland County in part.

17 As of five minutes before this call with
18 132,279 votes having been cast, there is a difference
19 between Candidate Brewster and Candidate Ziccarelli of
20 just 89 votes. I would add to that that I'm led to
21 believe Westmoreland is going to change those totals at
22 some point today, so the actual delta would be somewhere
23 closer to 73 votes. It's not exactly 73 votes. So
24 there is a tight race, to say the least.

25 THE COURT: Mr. Voss, can I just interrupt you

1 very briefly.

2 With respect to Westmoreland changing their
3 votes, are they intending to change the votes, in the
4 sense, are they going to count certain of the quote,
5 unquote, defective ballots, at least those that didn't
6 have the date or address or name on the declaration
7 consistent with the Pennsylvania Supreme Court's recent
8 decision?

9 MR. VOSS: My understanding is that issue
10 before the Supreme Court decision was presented, the
11 Board considered it. It did not draw a majority
12 position to adopt those votes or to count those votes.
13 So based on that, that decision by the Board of
14 Elections of Westmoreland County some many days ago,
15 it's my present understanding that those 343 undated
16 mail-in ballots in Westmoreland will not be counted.

17 THE COURT: Okay. When you mentioned the
18 change from 89 to 73, does that deal with some other
19 aspect of the change in count, not a decision that
20 Westmoreland County is going to now count the 343 votes?

21 MR. VOSS: Correct. I believe it has to do
22 with some provisional ballots that were tallied last
23 night and just having made their way through the
24 Department of State's website, at least as of, again,
25 five minutes before this call.

1 It's my understanding they have nothing to do
2 with the acute issue that's before the Court at the
3 moment.

4 THE COURT: Okay. Thank you.

5 MR. VOSS: As Your Honor pointed out, some of
6 the issues are in our complaint. These are the critical
7 numbers. 343 mail-in ballots, mailed in under Act 77 of
8 2019 were received in Westmoreland, voter declaration
9 that was signed but undated. Signed but undated, 343.

10 The Allegheny County Board of Elections
11 received 2,349 signed but undated ballots. Again,
12 signed but undated.

13 Two sets of identical ballots, two counties.

14 Initially, the Board voted in Allegheny County
15 to canvass those ballots which Candidate Ziccarelli
16 opposed. We filed a petition called a review in Common
17 Pleas, lost, and filed an immediate appeal to the
18 Commonwealth Court, which in a decision two to one
19 agreed with us that voter declarations under Act 77
20 shall be signed and dated. It's mandatory. It is not
21 directory and, therefore, it renders the ballot invalid
22 and cannot be counted.

23 That, of course, was promptly appealed to the
24 Pennsylvania Supreme Court and here is where things get
25 interesting and, hopefully, I can sort of separate out

1 what you just read this afternoon, having participated
2 in the case and had a little bit more time to digest the
3 opinions.

4 I would like to think of the Pennsylvania
5 Supreme Court's decision in this case as sort of a
6 three-one-three opinion.

7 So we have three justices who didn't agree
8 with us at all and would have said these ballots should
9 be counted.

10 We had three who agreed with us exactly and
11 said that the dating is absolutely required by the
12 statute. That is what makes a valid vote under the
13 Election Code and, therefore, the absence of a date
14 renders them invalid and they cannot be canvassed.

15 The vote in the middle was from Justice Wecht
16 is what swings us this way. He agreed with us that that
17 is a mandatory provision and that if you do not have a
18 dated declaration, your vote should not be counted. The
19 reason we are before this Court is he took a procedural
20 turn at that point and said, but I am only going to
21 apply this prospectively.

22 So, in effect, the three justices who didn't
23 agree with us threw a block of four votes to reverse the
24 Commonwealth Court notwithstanding the block of four
25 justices who agreed with us on the merits.

1 So I'm comfortable representing to the Court
2 that the law in the Commonwealth of Pennsylvania as it
3 stands right now according to our highest court is a
4 mail-in ballot without a dated declaration is invalid.
5 That is the law in the Commonwealth and, indeed, Justice
6 Wecht even said in the next election, that is how I
7 shall rule. That's beyond the count.

8 What we do with the procedural turn is why we
9 are here in court and we submit to you that that
10 procedural turn yielded at a minimum an equal protection
11 violation, if not a due process violation because now we
12 have similarly situated voters, those in Westmoreland
13 and those in Allegheny, who voted in the 45th precinct
14 receiving absolutely disparate and arbitrary treatment.

15 In the one county the votes are counted, I
16 submit to you inconsistent with the Election Code; and
17 in Westmoreland, they are not counted, absolutely
18 consistent with the Election Code.

19 To keep it real simple, this violates the
20 provision, sort of the analysis of equal protection in
21 *Bush v Gore*.

22 Why we are here with our Candidate Nicole
23 Ziccarelli is there is equal well-settled caselaw that
24 says when a violation of the Constitution occurs that
25 changes the outcome of the election, the candidate has

1 standing to pursue relief in federal court.

2 This decision by the Allegheny County Board of
3 Elections to accept these undated invalid ballots has
4 netted an additional 93 votes for Candidate Brewster.
5 Putting exactly a fine point on it, if these ballots are
6 not counted in the end, the next senator for the 45th
7 Senatorial District will be Nicole Zicarelli by about
8 20 votes. If these ballots are counted, it is likely
9 that Senator Brewster will remain the senator for the
10 45th.

11 So this issue is outcome determinative of the
12 election. We are here because we believe that this
13 outcome is determinative choice by the Pennsylvania
14 Supreme Court under state law effective a clear
15 violation of the Constitution under the principle of at
16 least *Bush v Gore*. That's why we're here.

17 THE COURT: All right. Thank you, Mr. Voss.
18 Let me just ask you a couple questions.

19 One, is are you familiar at all with Judge
20 Brann's recent decision from the Middle District of
21 Pennsylvania involving the Trump campaign after the
22 election? I don't know if you had a chance to review
23 that at all.

24 MR. VOSS: I had a chance to review portions
25 of the decision. I have not read it in its entirety.

1 THE COURT: I won't hold it against you. I'll
2 tell you what he said and I remember when I read it,
3 thinking about it, and when I read your complaint,
4 thinking about it again which is this. He said in
5 analyzing the equal protection claim, and I think he
6 said in *Heckler*, which is an old Supreme Court decision
7 on equal protection, he said when you have an equal
8 protection violation like, say, a *Bush v Gore* violation,
9 a court has basically two options.

10 One option is to level down, which is I think
11 what you are asking for here, in other words, to not
12 count the 2,000 votes from Allegheny County; or to level
13 up. In this context, I think what leveling up would
14 mean to gain consistency between Westmoreland and
15 Allegheny County, would be to count the 340 ballots from
16 Westmoreland County and that would solve the equal
17 protection problem or at least provide a remedy for that
18 problem.

19 Do you have any response -- one, do you have
20 any response to that? And, two, as a practical matter
21 from your client's perspective, is that going to change
22 the election?

23 I notice that Westmoreland County obviously
24 isn't named as a defendant here and I didn't know if the
25 reason they weren't named is because it wouldn't really

1 be outcome determinative if you only counted the three
2 hundred or so Westmoreland County ballots but continued
3 to count the two thousand or so Allegheny County
4 ballots.

5 MR. VOSS: I would respond in this way. Among
6 all else, the Election Code has a number of tight
7 procedural requirements that you have to meet. One of
8 them is when the Board of Elections does something that
9 impacts your candidate, you're on a real tight
10 turnaround, mandatory turnaround to get your complaint
11 into the Common Pleas Court and object to whatever
12 action they took against you.

13 In Westmoreland County, these votes were
14 rightly, as it turns out, set aside, and I do not, at
15 least I'm not aware of any challenge to that action by
16 Candidate Brewster. So, procedurally, to level up, as
17 you say, we would have to take Brewster's failure to
18 comport himself with the ministerial provisions of the
19 Election Code and give him the benefit of a second shot.
20 We preserved our objections since we went along and
21 pursued relief.

22 Again, I'll stress, and, frankly, this is why
23 Westmoreland is not here, we don't need Westmoreland
24 here because they did what the Election Code requires.
25 The Pennsylvania Supreme Court agrees with that, again,

1 under the three-one-three when you trace it out, they
2 agreed that is what a Board should do is set them aside.

3 To answer perhaps your second question,
4 Westmoreland is not here as a named defendant because we
5 don't need anything from them. We believe they counted
6 the ballots as the Election Code requires.

7 THE COURT: I guess I'll hear from the
8 defendants but I'm going to assume that they are going
9 to take a different position than the Pennsylvania
10 Supreme Court decision and say that really what
11 Allegheny County has done and what Secretary Boockvar
12 intends to do is fully comply with the Pennsylvania
13 Supreme Court decision which they would interpret as
14 requiring a count of those votes.

15 So assuming that to be the case, wouldn't
16 Westmoreland County effectively be violating that such
17 that a remedy in this case for sort of your *Bush v Gore*
18 equal protection argument would be to order Westmoreland
19 County to effectively count those three hundred or so
20 ballots?

21 MR. VOSS: Well, I would respond to that, Your
22 Honor, requiring Westmoreland to do that which four
23 justices of the Supreme Court agreed is not permitted by
24 the Election Code doesn't solve the Constitutional
25 dilemma.

1 The Constitutional dilemma here right now is
2 two counties are doing it differently. If we fix it so
3 they were both violating the Election Code, we would
4 still be here. We would still be saying Justice
5 Wecht -- let me be clear on this. The Allegheny County
6 Board of Elections is doing what Justice Wecht told them
7 to do. I mean that's what the Court said to do. I'm
8 not quarrelling with how they interpreted the order and
9 the order set aside the Commonwealth Court opinion and
10 restored the Common Pleas opinion.

11 I don't think we actually have a difference of
12 opinion on what the Court told them to do.

13 Our argument is you can't consistent with the
14 Constitution, the U.S. Constitution, say as a state this
15 is how you can't vote but this time around, we are going
16 to give you a free pass.

17 Let me underscore one point about what the
18 four justices availing and plotted out agreed with this
19 dating provision. This is an anti-fraud provision.
20 Justice Brobson stated it clearly in the Commonwealth --
21 Judge Brobson stated it clearly in the Commonwealth
22 Court, and then on appeal, we again get ratification
23 this is an anti-fraud provision.

24 So the notion that you can count some ballots
25 that the highest court agrees are invalid according to

1 the anti-fraud provision, that strikes me as a
2 Constitutional violation itself. So you send, from our
3 perspective, an unjust result over to Westmoreland
4 County.

5 I don't think that solves the problem. I
6 don't think it complies with the Constitution.

7 THE COURT: Thank you.

8 I'll hear from the defendants now. I don't
9 know who wants to go first. Mr. Szefi, Ms. Hangley, or
10 Mr. Levine.

11 MR. SZEFI: This is Mr. Szefi, Your Honor.
12 I'm happy to go first. I think I'll be very short.

13 THE COURT: Thank you.

14 MR. SZEFI: We agree with the analysis you
15 just stated. That's exactly why the Board took the vote
16 it did today. It was compelled to do so by the order of
17 the Supreme Court issued on Monday.

18 I would just add this. I can represent to the
19 Court that the Board did vote today by a vote of two-one
20 to certify the undated ballots. That has been done and
21 those amended totals have been forwarded to the
22 Department of State.

23 That is the only supplement I have to Your
24 Honor's summary of our position. It's exactly right.
25 Their request for relief to the extent they are

1 preventing us from taking any more action is moot.
2 Allegheny County is done. We have no more votes to
3 certify. So we believe that relief is moot.

4 The issue now rests with the Department of
5 State, which, as you mentioned, has been enjoined from
6 taking further action at this point.

7 Again, I would just disagree as you stated
8 with Mr. Voss' view of the Supreme Court opinion. It
9 was pretty clear that despite his reservations, Justice
10 Wecht concurred in the disposition of the cases, he said
11 directly in the opinion. So there really is a 4-3
12 decision on the disposition and we followed that
13 decision in voting as the Board did today.

14 THE COURT: Okay. All right. Thank you,
15 Mr. Szefi. Appreciate it.

16 Ms. Hangley.

17 MS. HANGLEY: Yes, Your Honor.

18 First, as a procedural point, the Commonwealth
19 has appealed from the Commonwealth Court ruling so that
20 automatic supersedeas is in effect for now. That
21 doesn't affect anything practically but we believe the
22 stay is no longer in effect to the certification.

23 No. 2, the more that petitioner's counsel
24 takes issue with the Supreme Court's order, which to be
25 clear, allowed Allegheny County to count those ballots,

1 the more we see the Rooker-Feldman issue here. The
2 petitioner is asking the Court to overrule the
3 Pennsylvania Supreme Court which is just not a role that
4 this Court is able to play.

5 The third point I would like to make is that
6 the Supreme Court opinion, especially Justice Wecht's
7 concurrence, is very -- it applies to ballots from
8 Philadelphia and Allegheny and it's very fact specific,
9 especially in Justice Wecht's concurrence and ruling
10 that those ballots should be counted despite his yield
11 as to the statute.

12 Westmoreland County was not a party there.
13 There is no evidence about Westmoreland. The Court
14 didn't say anything about Westmoreland, and the reason
15 for that is that nobody appealed the Westmoreland County
16 decision.

17 Petitioners had every opportunity to do that
18 and didn't do it. So for them to now come to this Court
19 and ask for relief that has to do with Westmoreland
20 County is something they're precluded from doing.

21 If they have an equal protection issue, which
22 we don't agree they do because of the fact specific
23 nature of the Supreme Court's ruling, but if they did,
24 the remedy would be to seek, as you say, to level up
25 from Westmoreland County, not to ask Allegheny County to

1 level down, which creates any number of additional
2 Constitutional violations for all those people whose
3 ballots the Pennsylvania Supreme Court has ordered to be
4 counted.

5 THE COURT: Okay. Thank you. I think I
6 understand the argument.

7 Mr. Levine.

8 MR. LEVINE: Yes. Thank you, Your Honor.
9 Cliff Levine on behalf of Senator Brewster and the
10 Pennsylvania Democratic Party.

11 Let me just jump right in. No. 1, just to be
12 clear, the decision -- there is an order, a court order.
13 The Pennsylvania Supreme Court issued an order that said
14 the decision of the Commonwealth Court is hereby
15 reversed and the decision of the Allegheny County Court
16 of Common Pleas is reinstated.

17 So although there were concurring opinions and
18 dissenting opinions, clearly Justice Wecht, who is
19 applying this prospectively and was ruling as the fourth
20 vote that the no-date ballots, as we call them, these
21 are the mail-in ballots with no date, they were to be
22 counted, and as Mr. Szefi indicated, Allegheny County
23 did do that.

24 So it's clearly a Rooker-Feldman argument.
25 There is some discussion about poor judgment, this or

1 that. There is a court order and this is unassailable
2 under the Rooker-Feldman Doctrine and so we now live
3 with this fact the no-date ballots are supposed to be
4 counted. That is sort of the end of the story there.

5 The good news which I want to clarify is that
6 Westmoreland County Board of Elections has never
7 actually ruled on the no-date ballots that it had, the
8 343 ballots. There was a motion by one of the three
9 members in the Board of Elections to adopt or to vote
10 and to count these particular ballots and the motion
11 then was tabled, so there was no action.

12 Furthermore, the Westmoreland County Board of
13 Elections has a meeting that is scheduled on Monday at
14 three p.m. in which they are going to do their final
15 computations, the very one that Mr. Szefi and Allegheny
16 County just did earlier this afternoon.

17 So there has not been this final resolution of
18 the count of these no-date ballots and, therefore, they
19 can -- Mr. Voss can certainly ask the Board and present
20 the opinion of the Supreme Court and say this is what is
21 being done in Allegheny and as Ms. Hanglely indicated, it
22 was broader and also, I think it's elevated with a case
23 from Philadelphia.

24 So we have statewide application to specific
25 counties, and I can tell Your Honor obviously the

1 Pennsylvania Democratic Party and Senator Brewster will
2 not object to a request to count the no-date ballots
3 because we think that the Supreme Court order compels
4 that. So we are not going to object to that. So they
5 can go into Westmoreland County and have that vote.

6 Just as Your Honor recognized in litigation a
7 hundred years ago, but in litigation considered back in
8 September or August, I guess, that would obviously
9 eliminate any protection claims because both counties
10 will be following the Supreme Court order and there will
11 be the same treatment here.

12 So there is a remedy. There is equality. I
13 think there is not an entitlement -- just to be clear as
14 to the Westmoreland case, I think one of the Board
15 members made the motion to count these and there was not
16 a second. So that matter is open.

17 To the extent that they feel it's foreclosed,
18 then they could have certainly taken an appeal of that.
19 We have a system where under the *McCracken* case from the
20 Pennsylvania Supreme Court, we have a system of 67
21 different Boards of Elections, you have to take an
22 appeal within two days, as Mr. Voss noted. The good
23 news is there was no ruling on those. They are still
24 there. They are uncounted. We will not be objecting if
25 they want to count the no-date ballot cases.

1 So we think Rooker-Feldman says that you can't
2 re-examine what is a clear order to count these ballots,
3 there is no equal protection because both Allegheny
4 County and Westmoreland are in a position to count these
5 ballots, and if there was any issues, it would be
6 associated with the failure of Ms. Ziccarelli to take
7 whatever appeals she felt she didn't take from
8 Westmoreland.

9 So for that reason, I just think that not only
10 should the TRO be denied, clearly it should be dismissed
11 under your prior opinions and under the opinion of Judge
12 Brann.

13 THE COURT: Okay. Thank you. Thank you,
14 Mr. Levine.

15 Mr. Voss, do you have any reply? Here, I'll
16 give you the last word.

17 MR. VOSS: Yes, I do. Thank you, Your Honor.

18 In terms of Rooker-Feldman, I'm not asking you
19 to overrule the Supreme Court. I actually agree with
20 the four justices who said this is a mandatory provision
21 of the Election Code and it must be followed. It's an
22 anti-fraud provision.

23 So in that sense, I'm not asking you to do
24 anything with the majority holding.

25 In terms of the procedural outcome of that

1 case, well, that's why we're here. Procedurally in
2 applying the Election Code as Justice Wecht's
3 determinative vote resulted, they violated the
4 Constitution. That is an event that occurred on Monday
5 and that's why we're here in federal court to seek
6 remedy.

7 In terms of we could have or should appeal
8 from Westmoreland, I'm not sure why we would ask
9 Westmoreland County Board of Elections to violate the
10 Election Code and count votes that four justices on the
11 Pennsylvania Supreme Court just said are invalid and
12 shouldn't be counted under the Election Code.

13 Now I understand procedurally the fact is that
14 they were counted here. I'm not going to perpetuate to
15 you what I submit is a Constitutional violation by
16 asking another Board to also violate the Constitution.
17 Frankly, that doesn't make a tremendous amount of sense.

18 What I didn't hear from any of the
19 presentations by counsel is anyone disagreeing with me
20 that four of them said this violates the Election Code.

21 MR. LEVINE: This is -- I'm sorry. I thought
22 you were asking a question.

23 THE COURT: Mr. Voss, why don't you complete
24 that. Then I can hear from whoever piped in there.

25 MR. LEVINE: Cliff Levine.

1 MR. VOSS: The final point I was going to
2 make, Your Honor, if there was a special election
3 tomorrow, name your race, and there were mail-in
4 ballots, under Justice Wecht's ruling, they would have
5 to be signed and dated. That's the block that came out
6 of that Court, and that's why we are here. I don't know
7 that equal process, equal protection and due process is
8 served by asking another Board to violate the Election
9 Code to count ballots that shouldn't be counted. That's
10 what we have by way of response.

11 THE COURT: Thank you, Mr. Voss.
12 Mr. Levine.

13 MR. LEVINE: Thank you, Your Honor.

14 As I said I don't -- Mr. Voss was talking
15 about future elections and that was the discussion that
16 Justice Wecht had in his concurring opinion.

17 The Order of Court -- forget all the
18 opinions -- the Order of Court says the decision of the
19 Commonwealth Court is hereby reversed and the decision
20 of the Allegheny County Court of Common Pleas is
21 reinstated, which, of course, the decision of Judge
22 James was to count the 2,349 votes.

23 Now, there was no question about what Mr. Voss
24 understood that order to be because Mr. Voss filed an
25 application for reargument and reconsideration with the

1 Pennsylvania Supreme Court. So he clearly understood
2 the implications. The implications were that those
3 2,349 votes were to be counted and that the Court had
4 clearly ordered that because they filed an application
5 for reconsideration; and today, by a five-to-two vote,
6 the Pennsylvania Supreme Court denied the application
7 for reconsideration.

8 So we are not in some alternative universe
9 here. We are in a situation where the Supreme Court
10 ordered the votes to count. Westmoreland has not yet
11 decided that issue. They have a meeting on Monday. You
12 can go and ask them to count.

13 If he doesn't want them to count, that's his
14 choice. He can represent his client however he wants to
15 do it, but clearly, he understood the implication of the
16 order because he asked for application of
17 reconsideration.

18 Thank you.

19 THE COURT: Okay. Thank you.

20 Anyone else before I -- I'm going to reach a
21 decision here because of the urgency. Anyone else have
22 anything to say at this point?

23 MR. SZEFI: No, Your Honor.

24 THE COURT: Thank you.

25 MS. HANGLEY: No, Your Honor.

1 THE COURT: All right. Very good.

2 Mr. Voss, anything final?

3 MR. VOSS: No, Your Honor. Thank you.

4 THE COURT: All right. Thank you.

5 Well, I appreciate everybody's very good oral
6 argument here today, and as I mentioned before, I
7 reviewed the verified complaint, as well as the
8 Pennsylvania Supreme Court decision, the motion for a
9 TRO; and based on my review of all of the materials and
10 the oral argument, as well as my review of the relevant
11 caselaw, I'm going to deny the motion for a TRO. I
12 applied the familiar four factors of success on the
13 merits, irreparable harm, harm to third parties, and the
14 public interest.

15 And focusing on the equal protection clause
16 claim in the complaint, I do think that the plaintiffs
17 make a very strong claim under *Bush v Gore*. I think
18 it's rare to have a quintessential *Bush v Gore* type
19 claim, but I believe one lies in this case based on the
20 State Supreme Court decision, as I understand it, has
21 led to essentially two potentially different counties
22 here, Allegheny County and Westmoreland County,
23 employing different standards by which to count certain
24 defective ballots.

25 So I do think this falls within *Bush v Gore*

1 which goes I think to a likelihood of success on the
2 merits to the plaintiff.

3 I do find that there would be irreparable harm
4 here, however, with respect to the other injunction
5 factors, harm to third parties and the public interest.
6 I'm mindful of the request that the plaintiff seeks here
7 which is to essentially level down so to speak.

8 As I mentioned, I reviewed Judge Brann's
9 recent decision from the Middle District of Pennsylvania
10 which relies on the Supreme Court decision in *Heckler*
11 and I believe an injunction in the context of a *Bush v.*
12 *Gore* situation like this one and presented by the facts
13 of this case would, if anything, require an injunction
14 that would level up, that is, that would require
15 Westmoreland County to count the three hundred and forty
16 or so ballots in a manner consistent with the
17 Pennsylvania Supreme Court's decision.

18 So, therefore, an injunction that levels down,
19 that does not count those votes, I find to be not
20 narrowly tailored to be in the public interest because
21 it would disenfranchise potentially thousands of voters
22 and cause harm to those individuals. So for that
23 reason, I don't believe the equitable relief that the
24 plaintiffs seek here is warranted.

25 Furthermore, based on at least Mr. Levine's

1 representation on behalf of the Pennsylvania Democratic
2 Party and Senator Brewster, it appears that Westmoreland
3 County may, in fact, count the 340 votes which would, in
4 effect, remedy any kind of equal protection violation.
5 So that also counsels against granting an injunction
6 here.

7 I would note with respect to the second claim
8 in the complaint, although no party has raised it in
9 this call, it's a substantive due process claim, and I
10 don't find that would have a success on the merits at
11 this point in time. I don't view that compliance with
12 the Pennsylvania Supreme Court's decision shocks the
13 conscience or the procedures implemented by Allegheny
14 County and Secretary Boockvar to count those defective
15 ballots and certify those ballots would place a burden
16 on the right to vote.

17 To the contrary, not counting those ballots
18 would burden the right to vote, and the benefits to
19 counting those I think are obvious here in the sense of
20 franchising voters. So with respect to Count 2, I don't
21 believe any aspect of Count 2 would give rise to or
22 provide a basis for equitable relief on a motion for a
23 TRO.

24 As I said at the outset, I appreciate the
25 urgency of this request and the urgency particularly for

1 the candidates here to have this issue resolved and,
2 therefore, my decision here is going to be what I just
3 stated on the record.

4 I'm going to order a copy of this transcript
5 to be split equally between all parties here, including
6 the intervenors. I'm going to issue an order after this
7 hearing that simply memorializes my denial of the motion
8 for a TRO for the reasons set forth on this record, such
9 that any party can immediately take an appeal to the
10 Third Circuit of this decision if they so elect to do
11 so.

12 That's my ruling in that respect.

13 Anything further from any of the parties for
14 the plaintiff, Mr. Voss?

15 MR. VOSS: No. Again, thank you, Your Honor,
16 for carving out some time for us right before the
17 holiday and we appreciate your reasons being stated
18 promptly and on the record.

19 THE COURT: Absolutely. Thank you.

20 Mr. Szefi?

21 MR. SZEFI: No, Your Honor. Thank you.

22 THE COURT: Ms. Hangley?

23 MS. HANGLEY: No, Your Honor. Thank you.

24 THE COURT: Mr. Levine?

25 MR. LEVINE: Thank you, Your Honor.

1 Just one small point. Is it possible to get a
2 copy of that transcript prior to Monday or Friday so
3 that it may become relevant at the Westmoreland County
4 Board of Elections meeting?

5 THE COURT: I think that's a great idea and I
6 believe -- I don't want to speak for Ms. Earley our
7 court reporter.

8 THE COURT REPORTER: You will have it Friday
9 morning.

10 THE COURT: Thank you. Thank you, everybody.
11 I appreciate you all jumping on this call and I want to
12 wish everybody a Happy Thanksgiving as well.

13 Take care.

14 (Whereupon, the above hearing concluded at
15 4:45 p.m.)

16 - - -

17 I hereby certify by my original signature
18 herein, that the foregoing is a correct transcript, to
19 the best of my ability, from the record of proceedings
20 in the above-entitled matter.

21

22 S/ Karen M. Earley

23 Karen M. Earley

24 Certified Realtime Reporter

25